

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

PLACEMENT OF FISH ATTRACTORS ON DEPARTMENT OF NATURAL RESOURCES PROPERTIES) Administrative Cause
) Number: 10-160P
)
) (LSA Document #10-566(F))

**RULE PROCESSING, REPORT OF PUBLIC HEARING
AND RECOMMENDATION FOR FINAL ADOPTION**

1. RULE PROCESSING

For consideration is a rule amendment adding 312 IAC 8-2-4.5 to require a license from a property manager before the placement of a fish attractor on a property administered by the Department of Natural Resources. The rule also provides for consultation within the Department before issuance of a permit for placement of a fish attractor. In situations where the Department's Division of Water determines that a fish attractor poses more than a minimal potential for harm, the rule proposal affirms the additional permitting requirements for placement of fish attractors in sites within a floodway under IC 14-28-1 or a navigable waterway under IC 14-29-1.

Background Information (Previous Rule Promulgation LSA Document #09-921)

The instant rule proposal, LSA Document #10-566(F), is identical to a previous rule proposal, LSA #09-921, which the Natural Resources Commission gave preliminary adoption during its November 18, 2008 meeting.

The portions of the minutes for the preliminary adoption of LSA Document #09-921 are included for additional information.

Consideration for preliminary adoption of proposed new rule, 312 IAC 8-2-4.5, to regulate the placement of fish attractors on waterways within DNR properties; Administrative Cause Number 08-095P [LSA Document #09-921]

John Bergman, Assistant Director of State Parks and Reservoirs, introduced this item. He said the proposed rule section would address the placement of materials in waterways, located on DNR properties,

which are intended to serve as fish attractors. The proposal arose from discussions among the property holding divisions which indicate there is not a consistent approach to managing the placement of fish attractors. He said that the U.S. Army Corps of Engineers has minimum standards for fish attractors, but it defers to the Department of Natural Resources for permitting or allowing fish attractors in the lakes. "However, we don't have a promulgated rule to deal with this. In order to provide a little more consistency to our managers at our lakes in any property that may have a request for fish attractor, we felt we needed to have a promulgated rule to have more standardized approach."

Phil French asked for an example of a fish attractor. Bill James explained that fish attractors have historically been made out of brush piles and tree tops.

Jane Ann Stautz moved to approve, as recommended by DNR personnel, the preliminary adoption of a proposed rule to regulate the placement of fish attractors on waterways within DNR properties. Phil French seconded the motion.

Larry Klein asked several questions concerning the implementation of a license for a fish attractor: Who would seek a license? Who creates the document an applicant would sign to seek a license? Would there be a form, and where would a person obtain a form?

Bergman responded that the purpose of the rule proposal was to provide property managers with latitude but to also have consistency with how requests are handled. He said the proposal would not specify a particular form, and the level of formality for a written approval could be determined within a division or among the various property holding divisions.

Steve Lucas suggested that the current property rules (312 IAC 8) which govern DNR properties probably already prohibit a visitor, without DNR authorization, from placing materials in a lake for use as a fish attractor. This proposal could put a finer point on current rules and practices, both to the benefit of the property managers and the understanding of the public.

The Chair called Stautz's motion for a vote. Upon a voice vote, the motion carried.

History of LSA Document #09-921:

- Notice of Intent posted to the Indiana *Register* on November 20, 2009
- Required fiscal analyses for LSA #09-921 forwarded to the Office of Management and Budget on December 2, 2009
- State Budget Agency letter of approval of rule amendments dated August 20, 2010 filed with Division of Hearings on August 26, 2010

Under IC 4-22-2-25, the Commission has one year from the date of the publication of the Notice of Intent to adopt a rule and obtain the approval or deemed approval of the Governor. LSA Document #09-921 was statutorily required to be approved by November 24, 2010. With this statutory deadline, there was not sufficient time to comply with the remaining statutory requirements governing rule adoption.

On September 8, 2010 a new “notice of intent” to adopt proposed rule amendments, LSA Document #10-566, was published in the *Indiana Register*. The notice identified John Bergman , Assistant Director of the DNR’s Division of State Parks and Reservoirs, as the “small business regulatory coordinator”. The Small Business Ombudsman was Ryan Asberry, Indiana Economic Development Corporation.

As specified by Executive Order, proposed fiscal analyses of the rule proposal were submitted to the Office of Management and Budget on September 10, 2010. In a September 29, 2010 letter, OMB approved the proposed rule amendments.

On October 6, 2010, the Division of Hearings submitted a copy of the proposed rule and corresponding “Economic Impact Statement” to the Legislative Services Agency (the “LSA”). LSA provided an intended date of posting of October 20. On October 12, the Division of Hearings provided LSA with a “Notice of Public Hearing” (with a “Justification Statement”). Later the same day, LSA issued to the Commission an “authorization to proceed” with the rule proposal.

A public hearing on the rule proposal was scheduled for November 22, 2010 in the Division of Hearings Office, Indiana Government Center North, 100 North Senate Avenue, Room N501, Indianapolis, Indiana. Notice of the public hearing and the text of the proposed amendments were posted in the *Indiana REGISTER* on October 20, 2010. This notice included the statement under IC 4-22-2.1-5 concerning rules affecting small businesses. The notice also included information required under IC 4-22-2-24. Notice of the public hearing with similar information was published on October 20, 2010 in the Indianapolis *DAILY STAR*, a newspaper of general circulation published in Marion County, Indiana. In addition, notice of the public hearing and a summary of the proposed rule changes were published on the calendar of the Commission’s website.

2. REPORT OF PUBLIC HEARINGS AND COMMENTS

The public hearing was convened as scheduled in Division of Hearings Office, Indiana Government Center North, 100 North Senate Avenue, Room N501, Indianapolis, Indiana. No one appeared for the public hearing, and no comments have been submitted regarding this rule

proposal.

3. RECOMMENDATION FOR FINAL ADOPTION

The proposed rules, as published for preliminary adoption, and as included in Exhibit “A”, appear to be lawful and ripe for final adoption.

The proposed rule amendments apply exclusively to waterways within or along Department of Natural Resources properties, and are designed primarily to support transparency with respect to the activities of the Department on properties administered by the agency. Rigid application of the Flood Control Act (IC 14-28-1) would require a license application through the DNR’s Division of Water, accompanied by a nonrefundable \$200 fee, for the placement of any “fish attractor” in some waterways on DNR properties. Most fish attractors are physically inconsequential, and licensure under the Flood Control Act would serve no meaningful purpose. A fish attractor is typically constructed of a few pieces of PVC pipe connected by a line or may be vegetation (such as a discarded Christmas tree). The placement of most fish attractors may be properly exempted from licensure, under the Flood Control Act, as constituting an activity that “poses no more than a minimal potential for harm” under IC 14-10-2-4(b).

But a DNR property manager needs to monitor if and under what circumstances a citizen should be authorized to place these materials in the property’s waterways. A circumstance could occur where the size or location of a fish attractor poses significant risks under the Flood Control Act. A fish attractor could be located near a dam or could be large enough to cause an impact to flood stages. The proposed rule provides for consultation between a property manager and the DNR’s Division of Water. 312 IAC 8-2-4.5(b)(3) would require the Department to develop a memorandum of understanding concerning characteristics of a fish attractor likely to pose more than a “minimal potential of harm” relative to the Division of Water’s review. Regardless of impacts regulated by the Flood Control Act, a property manager needs to know where fish attractors are located so that visitors to a forest, fish and wildlife area, or other state property are not endangered and so that placement will not detract from a property’s management plan.

The Department has not aggressively pursued licensure under the Flood Control Act for the placement of inconsequential fish attractors that are acceptable to a DNR property Division. The absence of a clear regulatory guidance has caused confusion to the public and allowed inconsistency of treatment among DNR property managers. A fee under the Flood Control Act is not commonly required under current practice and would not be commonly required under the proposed rule. The design of the rule is to provide adequate permitting to assure effective property management, to avoid double licensure, and to generally favor the less intrusive and free licensure associated with property management as compared to licensure under the Flood Control Act. If a significant structure is sought to be placed as a fish attractor, however, licensure would be required under the Flood Control Act.

The effective date stated in the Digest for the Notice of Intent (January 1, 2011) is an artifact of restarting the rule adoption process from a prior LSA Document. To comply with IC 4-22-2-36, this date must be deferred until at least 30 days after posting the Final Rule with the Publisher. To avoid confusion that can arise from a spring amendment to rules affecting lakes and streams, the hearing officer recommends further deferral of the effective date until January 1, 2012.

With this background, Exhibit “A” is presented for consideration as to final adoption.

Dated: December 1, 2010

Jennifer M. Kane
Hearing Officer

“EXHIBIT A”

TITLE 312 NATURAL RESOURCES COMMISSION

Final Rule

LSA Document #10-566(F)

DIGEST

Adds 312 IAC 8-2-4.5 to require a license from a property manager before the placement of a fish attractor on a property administered by the Department of Natural Resources and to provide for consultation within the Department before issuance of a permit and affirm the additional permitting requirements for sites within a floodway under IC 14-28-1 or a navigable waterway under IC 14-29-1, if the Department's Division of Water determines the fish attractor poses more than a minimal potential for harm. Effective January 1, 2012.

312 IAC 8-2-4.5

SECTION 1. 312 IAC 8-2-4.5 IS ADDED TO READ AS FOLLOWS:

312 IAC 8-2-4.5 Fish attractors

Authority: IC 14-10-2-4; IC 14-11-2-1; IC 14-28-1-5; IC 14-29-1-8

Affected: IC 14-28-1; IC 14-29-1

Sec. 4.5. (a) A person must obtain a license from a property manager, under this section, before constructing or placing a fish attractor within either of the following:

- (1) A waterway located on a DNR property.**
- (2) A navigable waterway that is within the riparian area of a DNR property.**

(b) To qualify for a license, a fish attractor must be each of the following:

- (1) Anchored to ensure proper settling.**
- (2) Not placed:**
 - (A) in a channel;**
 - (B) in a beach area; or**
 - (C) near the waterway surface or in an area that would adversely affect public safety and navigation as determined by the division of law enforcement.**
- (3) Constructed of materials approved by the department and applying methods to ensure safe placement. In implementing this subdivision, the property manager shall consult with the division of water. If the division of water determines placement or maintenance of the fish attractor poses more than a minimum potential for harm, the department shall require the applicant to obtain a license under the following:**
 - (A) IC 14-28-1 and 312 IAC 10 if located in a floodway.**
 - (B) IC 14-29-1 and 312 IAC 6 if located in a navigable waterway.**

The department shall develop a memorandum of understanding concerning characteristics of a fish attractor likely to pose more than a minimal potential for harm

relative to division of water review under this subdivision.

(4) Placed under the supervision of the division of fish and wildlife.

(c) The license holder must promptly remove from the waterway any portion of the fish attractor that becomes detached from the licensed structure. This responsibility is a condition of a license.

(d) This section does not apply to the placement of a fish attractor in a public freshwater lake. The placement of a fish attractor in a public freshwater lake is governed by 312 IAC 11-4-7.

(e) As used in this section, "fish attractor" means a structure or structures providing an artificial reef or similar habitat and that is or is intended to be beneficial to fish populations. (*Natural Resources Commission; 312 IAC 8-2-4.5*)

SECTION 2. SECTION 1 of this document takes effect January 1, 2012.